LIBRARY
SUPREME COURT, U. S.

Supreme Court, U. S.
FILED
OCT 18 1973
MICHAEL RODAK, JR., CLERK

In The Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-146

BEVERLY JANE WINN,

Petitioner,

-vs-

FLORIDA STATE BOARD OF NURSING,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL, FIRST DISTRICT OF FLORIDA

BRIEF OF RESPONDENT IN OPPOSITION

JULIUS FINECOLD
218 East Forsyth Street
Jacksonville, Florida 32202
Attorney for Respondent

INDEX

	Page
STATUTE INVOLVED	1
QUESTION PRESENTED	1
STATEMENT OF THE CASE	2
REASONS FOR DENYING WRIT	3
I. Lack of jurisdiction of the Supreme Court due to failure of Petitioner to properly raise a specific federal question in the state courts as required by Supreme Court Rule 23(1)(f) and 28 USC 1257(3)	3
II. The statute in question is not vague and indefinite	5
CONCLUSION	6
CERTIFICATE OF SERVICE	6

CITATION OF AUTHORITIES

CASES

Amalgamated Food Employees Union v. Logan Valley Plaza, 391 U.S. 308	2
Bell v. University of New York, 295 N.Y. 101, 665 NE 2d 184	7
Bowe v. Scott, 233 U.S. 658	4
Cardinale v. Louisiana, 394 U.S. 437	5
Dilbiard v. State Medical Examiners, 69 Colo. 575, 196 Pac. 866	7

CITATION OF AUTHORITIES—Continued

	Page
In Matter of Cherry, 289 N.Y. 158, 44 NE 2d 411	8
Knight v. Louisiana State Board of Medical Examiners, 211 So.2d 433	5
McGoldrick v. Compagnie General, 309 U.S. 430	4
Oxley Stave Co. v. Butler County, 166 U.S. 648	2
Safeway Stores v. Oklahoma Grocers, 360 U.S. 334	5
Semler v. Oregon State Board of Dental Examiners 294 U.S. 608	8
State ex rel. Degaetani v. Driskill et al. State Board of Medical Examiners, 139 Fla. 49, 190 So. 461	6
Whitney v. California, 274 U.S. 357	4
Wilson v. Cook, 327 U.S. 474	4
STATUTES	
28 U.S.C. 1257	3
Section 464.21, Florida Statutes	1, 3, 5
CONSTITUTION	
Florida Constitution Article 1 Section 9	4
MISCELLANEOUS	
Supreme Court Rules (Rule 23)	2
70 Corpus Juris Secundum - Physicians and Surgeons Page 877	6

In The
Supreme Court of the United States

OCTOBER TERM, 1973

No.

BEVERLY JANE WINN,

Petitioner,

-vs-

FLORIDA STATE BOARD OF NURSING,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL, FIRST DISTRICT OF FLORIDA

BRIEF OF RESPONDENT IN OPPOSITION

STATUTE INVOLVED

Florida Statute 464.21(1)(b) as set out in Petitioner's brief in Appendix 1.

QUESTION PRESENTED

Respondent adopts the question presented in Petitioner's brief as it appears on page two.

STATEMENT OF THE CASE

Respondent adopts the statement of the case presented in Petitioner's brief as it appears on Pages two and three.

REASONS FOR DENYING WRIT

I

LACK OF JURISDICTION OF THE SUPREME COURT DUE TO FAILURE OF PETITIONER TO PROPERLY RAISE A SPECIFIC FEDERAL QUESTION IN THE STATE COURT AS REQUIRED BY SUPREME COURT RULE 23(1)(f) and 28 USC 1257(3).

In cases coming to the U.S. Supreme Court from a state court, the only issues which are subject to review by the Supreme Court are those which were presented to the state court. As said by the Supreme Court in *Amalgamated Food Employees Union v. Logan Valley Plaza*, 391 U.S. 308, 334--this is jurisdictional.

Furthermore, when the question is raised in the state court it must be raised with particularity and cannot be left to conjecture, speculation or inference. As the court stated in *Oxley Stave Co. v. Butler County*, 166 U.S. 648, 655 "the jurisdiction of this court to re-examine the final judgment of a state court cannot arise from mere inference, but only from averments so distinct and positive as to place it beyond question that the party bringing a case here from such court intended to assert a Federal right."

Likewise, Rule 23(1)(f), Supreme Court Rules states "If review of the judgment of a state court is sought, the statement of the case shall also specify the stage in the proceed-

ings in the court of first instance and in the appellate court, at which, and the manner in which, the federal questions sought to be reviewed were raised; the method of raising them (e.g. by a pleading, by request to charge, and exceptions, by assignment of error); and the way in way they were passed upon by the court; with such pertinent quotations of specific portions of the record, or summary thereof, with specific reference to the places in the record where the matter appears (e.g. ruling on exception, portion of the court's charge and exception thereto, assignment of errors) as will show the federal question was *timely and properly* raised (emphasis supplied) so as to give this court jurisdiction to review the judgment on writ of certiorari."

In addition Title 28 USC 1257(3) limits the jurisdiction of the Supreme Court to review the final judgment or decree by the highest court of a state by writ of certiorari as follows: "Where the validity of a treaty or statute of the United States is drawn in question or where the validity of a state statute is drawn in question on the grounds of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is *specifically set up or claimed under the Constitution*, (emphasis supplied), treaties or statutes of a commission held or authority exercised under the United States."

A careful reading of Petitioner's brief, including the appendix fails to reveal where any federal question has been raised with the necessary particularity. Petitioner on Page two of his brief under "Question Presented" does ask whether the language of Florida Statute 464.21(1)(b) is sufficiently definite to meet the minimum requirements of "due process." Does this satisfy the requirement that Petitioner specifically set up the federal question involved in the state court? It is submitted that it does not.

In *Bowe v. Scott*, 233 U.S. 658, at page 664 and 665, appellant in invoking the jurisdiction of the Supreme Court averred in the state court "That the ordinance is an attempt to take from your complainants whose property adjoins and abuts upon the said alley their rights in and to said alley *without due process of law*" (emphasis supplied). The court held that such an averment was insufficient to invoke the jurisdiction of the U.S. Supreme Court saying "But it is settled that such an averment making no reference to the Constitution of the United States and asserting no express rights thereunder is solely referable to the state court, which in this instance has a due process clause, and affords *no basis whatsoever for invoking the jurisdiction of this court*" (emphasis supplied).

Article 1 Section 9 of the Florida Constitution contains the due process clause of said constitution. It states "No person shall be deprived of life, liberty or property without due process of law, or be twice put in jeopardy for the same offense or be compelled in any criminal matter to be a witness against himself."

It is submitted that once a case reaches the U.S. Supreme Court, review is limited to the specific federal question that was properly raised in the state court. *Whitney v. California*, 274 U.S. 357, 362-3; *Wilson v. Cook*, 327 U.S. 474, 483-4. As the court said in *McGoldrick v. Compagnie Generale*, 309 U.S. 430, 434-435 "In cases coming here from state courts in which a state statute is assailed as unconstitutional, there are reasons of peculiar force which should lead us to refrain from deciding questions not presented or decided in the highest court of the state whose judicial action we are called upon to review. Apart from the reluctance with which every court should proceed to set aside legislation as unconstitutional on

grounds not properly presented, due regard for the appropriate relationship of this court to state courts requires us to decline to consider and decide questions affecting the validity of state statutes not urged or considered there. It is for these reasons that this court, where the constitutionality of a statute has been upheld in the state court consistently refuses to consider any grounds of attack not raised or decided in that court." Petitioner is at this point of time, furthermore, precluded from urging a federal issue that was not raised or decided below even though such issue might have been raised. *Safeway Stores v. Oklahome Grocers*, 360 U.S. 334, 342 n.7; *Cardinale v. Louisiana*, 394 U.S. 437, 438.

II

THE STATUTE IN QUESTION IS NOT VAGUE AND INDEFINITE.

All the cases relied upon by Petitioner in his brief to substantiate his position that Florida Statute 464.21(1)(b) is vague and indefinite are criminal statutes which by their very nature must be strictly construed. The statute in question is not a criminal statute but rather a regulatory one.

In *Knight v. Louisiana State Board of Medical Examiners*, 211 So.2d 433 the appellant attacked Louisiana's Medical Practice statute as being too vague and indefinite. The Louisiana Supreme Court disagreed, saying "It is a regulatory provision enacted by the legislature to insure that the medical profession in this state will meet certain standards of conduct commensurate with the needs of the general welfare of its people. The penalty for failure to do so is not imprisonment, one who violates the standards of ethical practice simply may lose his right to practice medicine either temporarily or permanently."

The same approach was taken by the Florida Court in *State ex rel. Degaetani v. Driskell et al. State Board of Medical Examiners,* 139 Fla. 49, 190 So. 461, which inter alia the appellant in his petition for a writ of certiorari to review an order of the State Board of Medicine revoking his license complained of the fact that he was not accorded a jury trial. The Florida Supreme Court speaking through its Chief Justice said "It is not out of place to state, however, that this is not such a case as entitled appellant to a trial by jury. It is not a criminal prosecution and the Circuit Court acts only as a reviewing court."

The language used in the statute in question is similar to that used in most of our sister states and although attacked in other states on similar grounds of being vague and indefinite, the courts have overwhelmingly held such statutes not to be void for want of certainty and definiteness.

As stated in 70 Corpus Juris Secundum 877 "The most common statutory grounds for revocation or suspension of the license or certificate of a physician, dentist or chiropractor are unprofessional, dishonorable or immoral conduct. Similar grounds prescribed by the statutes of some jurisdictions are gross immorality, malpractice, gross violation of professional duties, gross misconduct in the practice of the profession, gross carelessness, or manifest incapacity and grossly unprofessional conduct of a character likely to deceive or defraud the public. The subject matter of statutes prescribing such grounds is within the police power and, except in a few instances, the statutes are held *not to be void for uncertainty and indefiniteness;* (emphasis supplied) the legislature is not required to define with particularity the acts which constitute unprofessional conduct. The board, under such a provision, has power in the first instance to decide

what acts constitute unprofessional conduct, subject to judicial interference only in the abuse of such power, but the board is not required to prescribe by regulation what those acts shall be; . . . . . Generally speaking, apart from or in the absence of, statutory definitions, what constitutes unprofessional conduct or gross immorality must be determined by those standards which are commonly accepted by those practicing the same profession in the same territory. In determining what constitutes dishonorable conduct every case must be determined on its own particular facts."

In *Dilbiard v. State Medical Examiners*, 69 Colo. 575, 196 Pac. 866 the Colorado court held that the phrase "immoral, unprofessional or dishonorable" in a statute characterizing conduct for which the Board of Medical Examiners might revoke a physician's license was not subject to the objection of indefiniteness and uncertainty. The court said "We must conclude that the words 'immoral, unprofessional or dishonorable' are sufficiently definite and that the board has jurisdiction to determine what constitutes unprofessional and dishonorable conduct and to revoke a license on account of such conduct." The court also pointed out that "although the Medical Board has the power to decide in the first instance what constitutes unprofessional conduct, yet if it abuses that power, as counsel fears it will, the courts may review its decision and reverse it."

In *Bell v. University of New York*, 295 N.Y. 101, 65 N.E. 2d 184, a dentist's license to practice dentistry was suspended for one year after a determination by the State Board of Dental Examiners that the petitioner was guilty of unprofessional conduct. The New York court in affirming the determination of the Board of Regents' decision that the Petitioner was guilty of unprofessional conduct said that "It has

never been necessary for the Legislature or the Board of Regents to define with particularity acts which would constitute unprofessional conduct, whether in the field of dentistry or pharmacy." The court went on to quote with approval from *In Matter of Cherry*, 289 N.Y. at page 158, 44 N.E. 2d at page 411, "What constitutes unprofessional conduct by a dentist must be determined by those standards which are commonly accepted by those practicing the same profession in the same territory. The law is a very ancient profession and certain forms of conduct have been banned as unprofessional for centuries in both England and America. Ancient traditions have created rigid bans and by common consent those who violate those bans should be excluded from the goodly company of the members of the bar. At least in part these bans have been formulated in Canons of Ethics adopted and enforced by associations of members of the bar. In the profession of the law no person can plead ignorance as palliation for professional misconduct. In vocations, like dentistry, more recently accepted as professions, professional standards are perhaps less uniform, less well understood, and less rigidly defined. Nevertheless, the standards of conduct generally accepted by practitioners in the State of New York are not so indefinite that they cannot be determined by qualified persons. They are part of the ethics of the profession and 'what is generally called the "ethics" of the profession is but the consensus of expert opinion as to the necessity of such standards.' *Semler v. Oregon State Board of Dental Examiners, supra*, 294 US (608 at) page 612. 55 S Ct. (570. at) page 572.79 L ed 1086. Every member of the profession should be regarded as an expert for such purpose. There is a moral dereliction in failure by any member of a profession to apply in professional practice the standards which, by consensus of opinion in the profession, are necessary."

CONCLUSION

In view of the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

JULIUS FINEGOLD
218 East Forsyth Street
Jacksonville, Florida 32202

Attorney for Respondent

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that copy of the foregoing Brief of Respondent in Opposition has been furnished The Supreme Court of Florida, Tallahassee, Florida, Florida District Court of Appeal, First District, Tallahassee, Florida, and to Stephen H. Davis and P. Donald DeHoff, 802 Barnett Bank Building, Jacksonville, Florida 32202, Attorneys for Petitioner, by United States Mail, this ..... day of October, 1973.

.....

Attorney